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## THE RULE-MAKING PROCESS AND EMERGENCY RULES IN CHAPTER 227, STATS.

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- I. **Introduction to Chapter 227 (Administrative Procedure Act).** The primary statutory source for administrative procedure and review in Wisconsin.
  - A. The basic text was adopted in 1943 based on a draft of the original Model Administrative Procedure Act prepared by the Commission on Uniform State Laws. Wisconsin retains the substance of the original model act. For a discussion of the original act, see Hoyt, Wisconsin Administrative Procedure Act, 1944 Wis. L. Rev. 214 to 239.
  - B. The chapter is divided between administrative rule-making procedure and contested case procedure. The rule-making sections were comprehensively reviewed in 1955 when a Legislative Council Committee on Administrative Rule-Making suggested a series of revisions to Ch. 227 that were enacted into law. [See Ch. 221, Laws of 1955.] Extensive revisions to the legislative rule review process were adopted in 1979. These revisions include both Legislative Council review and legislative committee review of proposed administrative rules. [See, also, a recodification of these procedures in 1985 Wisconsin Act 182.] The contested case sections were reviewed by the Judicial Council and substantially revised in legislation adopted in 1975. [See Ch. 414, Laws of 1975, effective September 22, 1976.]
  - C. The distinction between rule-making and contested cases is defined by Davis in Administrative Law Text (3rd Ed. 1972), at 124, as “[contested case] resembles what courts do in deciding cases, and that rule-making resembles what legislatures do in enacting statutes.” In Wisconsin, the distinction is exemplified in s. 227.01 (3), Stats., defining “contested case,” and s. 227.01 (13), Stats., defining “rule.”

II. **Who can issue rules and what are rules?** [s. 227.01, Stats.]

- A. Agency means a board, commission, committee, department or officer in state government. The definition is broad, but does not include the Governor, a district attorney or a judicial or military officer. The term has no application to local boards or agencies. [See s. 227.01 (1), Stats. See, also, State ex rel. Clifton v. Young, 133 Wis. 2d 193, 394 N.W. 2d 769 (Ct. App. 1986), in which the Wisconsin Court of Appeals found that a memorandum regarding good time forfeiture procedures in the state prisons issued by the Executive Assistant of the Department of Health and Social Services was a policy that should have been promulgated as an administrative rule under Ch. 227. The case stands for the proposition that a policy otherwise meeting the definition of “rule” issued by a representative of an agency will be imputed to the agency.]
- B. What authority exists for agencies to issue rules?
1. Section 227.01 (13), Stats., states, “‘Rule’ means a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.” [Emphasis added.]
  2. For a rule to be valid, it must be based upon a proper delegation of power by the Legislature. [See State v. DILHR, 77 Wis. 2d 126, 133, 252 N.W. 2d 353, 356 (1977).] Section 227.11 (2), Stats., then confers general rule-making authority based on the separate legislation granting powers to an agency. Often, specific statutes also authorize an agency to issue rules.
  3. Courts in Wisconsin have generally stated that general statutory authority is sufficient “for the power conferred...is limited by the procedural safeguards and review by the courts under the Administrative Procedure Act.” [See State v. DILHR, 77 Wis. 2d 135, 252 N.W. 2d 357 (1977).]
  4. However, several cases have held that specific rules under that delegation may not have been expressly or implicitly authorized by the Legislature. State v. DILHR, *supra*. The Wisconsin Supreme Court has stated that an administrative agency has only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates. [See Kimberly-Clark Corporation v. Public Service Commission, 110 Wis. 2d 455, 461, 329 N.W. 2d 143 (1983), and Oneida County v. Converse, 180 Wis. 2d 120, 508 N.W. 2d 416 (1993).] The Court has also held that any reasonable doubt of existence of an implied power of an administrative agency should be resolved against the exercise of such authority.
  5. Despite uniform governing statutes, rule-making procedures differ greatly from agency to agency.

C. What does the definition of “rule” in s. 227.01 (13), Stats., mean?

1. The question of what constitutes a rule is the subject of litigation and interpretation. Whether an agency action is a rule is crucial because, if it is a rule, it brings into play the latter sections of the act requiring hearing [ss. 227.16 to 227.18, Stats.], review [ss. 227.15 and 227.19, Stats.], filing [s. 227.20, Stats.] and publication [s. 227.21, Stats.]. If a pronouncement is a rule, then it must be properly promulgated under Ch. 227. If it is properly promulgated under Ch. 227, then that pronouncement or “rule” has the force and effect of law. See 63 OAG 159 (1974). [See, also, Milwaukee Area Joint Plumbing v. DILHR, 172 Wis. 2d 299, 493 N.W. 2d 744 (Ct. App. 1992), for an interesting adventure concerning the definition of a “rule” and the impact of determining that a policy is a rule.]
2. Section 227.01 (13) (a) to (2q), Stats., exempt a large body of agency pronouncements from the requirements of Ch. 227.
3. Does the Administrative Code contain all state materials that should be promulgated as rules?

III. Drafting and reviewing of proposed rules.

A. Agencies ordinarily prepare the initial draft of the rules internally.

1. Section 227.13, Stats., allows the agency to use informal conferences and consultations in the process of drafting. Some agencies make effective use of drafting committees that include a wide range of parties. Others widely disseminate several drafts for input prior to the version that is noticed for the “formal” administrative rule-making procedure.
2. Citizens and interested groups may petition for rule-making under s. 227.12, Stats. Often, the petition includes a drafted set of rules, although that is not required. The statute provides that the petition must contain:
  - a. The substance or nature of the rule-making requested.
  - b. The reason for the request and the petitioners’ interest in the requested rule.
  - c. A reference to the agency’s authority to promulgate the requested rule.

Within a reasonable period of time after the receipt of a petition, an agency must either deny the request or proceed with the rule-making.

- B. The drafting format and style is described in s. 227.14, Stats. The Legislative Council Staff and the Revisor of Statutes issue an “Administrative Rules Procedures Manual” which details rule drafting.

- C. In 1979, a significant modification was made in the rule drafting system. The Legislative Council Staff, a legislative service agency, was given authority under s. 227.15, Stats., to review a proposed rule prior to the agency's public hearing.
1. An agency is required to submit proposed rules to the Legislative Council Staff for review after the agency decides to promulgate rules and prior to any public hearing on the proposed rules. If no hearing is required, the agency must submit the proposed rules to the Legislative Council Staff prior to notification of legislative standing committees that rules are being proposed. [See s. 227.15 (1), Stats.]
  2. The Legislative Council Staff acts as a Clearinghouse for rule drafting and cooperates with the agency and the Revisor of Statutes to:
    - a. Review the statutory authority under which the agency intends to adopt the proposed rule.
    - b. Ensure that the procedures for the promulgation of a rule required by ch. 227, Stats., are followed.
    - c. Review the proposed rule for form, style and placement in the Administrative Code.
    - d. Review the proposed rule to avoid conflict with or duplication of existing rules.
    - e. Review the proposed rule to provide adequate references to related statutes, rules and forms.
    - f. Review the proposed rule for clarity, grammar and punctuation and to ensure the use of plain language.
    - g. Review the proposed rule to determine potential conflicts and to make comparisons with related federal regulations.
    - h. Review the proposed rule to ensure that the agency specifies the number of business days for permit approval when a business is required to obtain a permit. [See s. 227.15 (2), Stats.]
  3. The period for Legislative Council Staff review of a proposed rule is 20 working days following the receipt of the proposed rule. With the consent of the Director of the Legislative Council Staff, the review period may be extended for an additional 20 working days. [See s. 227.15 (2), Stats.]
  4. The Legislative Council Staff assigns a Clearinghouse Rule number to each rule, prepares a rule jacket for each house of the Legislature and begins a record of action for each rule in the Legislature's Bulletin of Proceedings.

5. The Legislative Council Rules Clearinghouse Report acts as a warning device for an agency. Comments made on statutory authority, form and clarity can be used by advocates.

IV. **Rule-making hearings.** [ss. 227.16, 227.17 and 227.18, Stats.]

A. Notice and hearings.

1. All rule-making must be preceded with notice and public hearing unless:
  - a. Procedural [s. 227.16 (2) (a), Stats.];
  - b. Clarifying [s. 227.16 (2) (b), Stats.];
  - c. Emergency rules [s. 227.16 (2) (c), Stats.];
  - d. Joint Committee for Review of Administrative Rules (JCRAR) directive [s. 227.16 (2) (d), Stats.]; or
  - e. Published in full in the Administrative Register unless petitioned (30-day rule) [s. 227.16 (2) (e), Stats.].

These exceptions do not apply if other statutes require a hearing or the agency decides to hold a hearing [s. 227.16 (4), Stats.]. Prehearings for public input are discussed in s. 227.16 (6), Stats.

2. The emergency rule exception is an important exception which has been extensively utilized.
3. Notice for hearings is placed in the Administrative Register, at least 10 days prior to the date set. The notice required is minimal.

- B. The rule-making hearing is of a quasi-legislative variety. Section 227.18 (1) (b), Stats., requires a summary of the factual information on which the proposal is based. However, unlike judicial review of legislative actions, in which factual bases may be presumed to support relationships between enactments and legitimate governmental purposes, the Wisconsin Supreme Court has held that, in order to support agency rule-making, facts of record must exist to demonstrate a reasonable basis for an agency's rule. [See Liberty Homes, Inc. v. DILHR, 136 Wis. 2d 368, 401 N.W. 2d 805 (1987).]

- C. The hearing is often conducted in front of an examiner other than the decision-maker. The final authority in the agency is the promulgator. In some agencies, that may be a several step process. For example, a secretary and board may be involved.

- D. Must a new rule-making procedure begin when a revised rule differs from the noticed draft? The review process in s. 227.19, Stats., compensates for changes.

V. **Legislative review of rules.** [s. 227.19, Stats.]

- A. When an agency submits a proposed rule to the Legislature, it must notify the presiding officer of each house that the proposed rule is in final draft form. [See s. 227.19 (2), Stats.] The notification includes:
  - 1. The proposed rule, including the analysis and fiscal estimate and either a copy of any new or revised form required by the rule or a description of how it can be obtained at no charge. Also, if required, a final regulatory flexibility analysis must be included.
  - 2. The Legislative Council Staff Clearinghouse Report.
  - 3. A report that must include:
    - a. Conclusions and recommendations of the agency that **demonstrate the need** for the proposed rule and its reasonableness.
    - b. **Explanations of modifications** made in the proposed rule as a result of the Legislative Council Staff Clearinghouse Report and testimony received at public hearings.
    - c. **A list of persons** who appeared or registered for or against the proposed rules at any public hearing held by the agency.
    - d. A response to Legislative Council Staff recommendations in the Clearinghouse Report indicating acceptance of the recommendations in whole or in part, rejection of recommendations in whole or in part and reasons for not accepting recommendations. [See s. 227.19 (3), Stats.]
- B. Each presiding officer must, within seven working days, refer the proposed rule to one committee. [See s. 227.19 (2), Stats.]
- C. The procedures for committee review under s. 227.19 (4), Stats., include the following:
  - 1. The committee review period lasts for 30 days from the date the proposed rule is referred. If, within the 30-day period, a committee directs an agency to meet with it to review the proposed rule, the standing committee review period is extended for 30 days from the date of that request.
  - 2. If during the review period a committee, following executive action by the committee, and the agency agree to make modifications in proposed rules, the period for review by both committees is extended for 10 days following receipt by the committees of the modified proposed rule.

3. The agency may not promulgate the proposed rule during the review period unless both committees waive the authority of the committees to object to the proposed rule. Either committee may object to the proposed rule. Either committee may object to the proposed rule in whole or in part. If neither committee objects to the proposed rule during the review period, the rule may be promulgated.
  4. The agency, during or after the review period, may submit germane rule modifications without a request from a reviewing committee.
- D. If either committee objects to a proposed rule, the proposed rule must be referred to the JCRAR for the following process under s. 227.19 (5), Stats.:
1. The Joint Committee review period lasts for 30 days from the date the proposed rule is referred and the Joint Committee must take action within that time.
  2. The Joint Committee may concur or nonconcur in the reviewing committee's objection or may agree with the agency that modifications to the proposed rule will be made.
  3. An agency may not promulgate rules that have received an objection by a standing committee, unless there is nonconcurrence by the Joint Committee in the standing committee's objection.
  4. The Joint Committee may object to a proposed rule only for one or more of the following reasons:
    - a. There is an absence of adequate statutory authority for promulgation of the rule.
    - b. An emergency exists relating to public health, safety or welfare.
    - c. The rule fails to comply with legislative intent.
    - d. The rule is contrary to state law.
    - e. There has been a change of circumstances since the original date of passage of the earliest law upon which the rule is based.
    - f. The rule is arbitrary and capricious or imposes an undue hardship.
  5. If the Joint Committee objects to a rule, the Committee must place before each house of the Legislature, within 30 days of the objection, a bill to prevent the promulgation of the rule.
  6. If both bills are defeated or fail of enactment in any manner during a regular session, then the proposed rule may be promulgated.

- E. At the end of each legislative session, the rule jackets, and their accompanying reports and information are deposited with the State Historical Society.

VI. **Filing and publication of rules.** [ss. 227.20 to 227.22, Stats.]

- A. A certified copy of the rules must be filed with the Secretary of State and the Revisor of Statutes. [See s. 227.20 (1), Stats.] The format is spelled out in s. 227.20 (1), Stats. The rules are published in the Administrative Code and usually are effective on the first day of the month following publication in the Administrative Register. [See s. 227.22 (2), Stats.]

VII. **Emergency rules.** [s. 227.24, Stats.]

- A. Emergency rules are exempted from the notice and public hearing requirements of s. 227.24, Stats., but there are requirements for procedures to be followed when utilizing the emergency rule route. [See s. 227.24 (1), Stats.]
- B. When can the emergency rule route be utilized?
  - 1. Section 227.24 (1) (a), Stats., states: “An agency may promulgate a rule as an emergency rule without complying with the notice, hearing and public requirements under this chapter if preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.”
  - 2. There are no published Wisconsin cases clarifying the definition above.
  - 3. The study by the Legislative Council on administrative rule-making, in its report of 1954, stated:

Note: The requirement of notice and public hearing on rule-making plus the delay of the effective date of a rule until the first day of the month following publication in the monthly register may, under certain circumstances, mean that 2 to 3 months will elapse from the time an agency commences formal rule-making proceedings until the rule can be put into effect. There are situations wherein rules must take effect without such delay. A relatively recent example was the Department of Agriculture’s rule restricting and regulating the shipment of hogs during a threatened epidemic of vesicular exanthema. This section therefore provides that emergency rules may take effect immediately upon their publication in the official state paper. This satisfies constitutional publication requirements and allows the rule to become effective without delay. Sub. (2) prescribes certain supplementary publicity procedures, but the validity of the rule is not dependent on compliance with these procedures. Emergency rules, however, remain in effect for a period of only 120 days. By the end of that period, the agency will have had ample time to adopt a rule pursuant to regular rule-making procedures if such a rule is needed. This limitation on the effectiveness of



an emergency rule should discourage the use of the emergency procedure to circumvent regular procedures, except in actual emergencies.

4. Is an emergency a life-threatening situation or some form of administrative convenience?
- C. If the emergency rule procedure is utilized, a special procedure is outlined. [See s. 227.24, Stats.]
1. An agency is authorized to adopt an emergency rule, if compliance with the notice, hearing and publication requirements would jeopardize the public health, safety or welfare.
  2. An emergency rule takes effect upon publication in the official state newspaper or such later date specified. Establishing an effective date later than the publication date is consistent with s. 227.24 (1) (c), Stats.
  3. Emergency rules are effective for 150 days.
  4. In 62 OAG 305 (1973), the Attorney General found that extending the effectiveness of emergency rules by refiling is not prohibited by s. 227.24 (1), Stats., but refiling is contrary to legislative intent.
  5. Section 227.24 (3), Stats., outlines the filing requirement for an emergency rule:
    - a. It must be mailed to each member of the Legislature.
    - b. A copy must be filed with the Revisor of Statutes who is required to include in the notice section of the Administrative Register a brief description of emergency rules in effect.
  6. Section 227.24 (3), Stats., also provides a general charge to notify the world by “feasible” steps.
- D. In recent years, there has been an increased utilization of the emergency rule section. This is primarily due to the six to 12 months generally required to adopt a rule through the new procedures. Despite academic attention to the misuse of emergency rule procedures, it continues with little litigation or other public attention. [See Comment, “The Wisconsin Emergency Rule Provision: Increased Use in Response to a Slow Rule-Making Process,” 1978 Wis. L. Rev. 485.]
- E. Section 227.24 (2), Stats., gives the JCRAR the power to extend the emergency rules in addition to the maximum period provided in s. 227.24 (1) (c), Stats. The effectiveness of emergency rules may be extended for no more than 120 days.

VIII. **Legislative review of administrative rules which have taken effect.** [s. 227.26, Stats.]

- A. The JCRAR may suspend a rule at any time following promulgation after receiving testimony at a public hearing. [See s. 227.26 (2) (d), (f) and (i), Stats.]
  - 1. The Joint Committee may suspend a rule only for one or more of the same reasons used to object to a proposed rule.
  - 2. Within 30 days of a suspension, the Joint Committee must introduce in each house of the Legislature a bill to repeal the suspended rule.
  - 3. If the rules are defeated or fail of enactment in any other manner during a regular session, then the rule stands and the Joint Committee may not suspend it again. If either bill becomes law, the suspended rule is repealed and may not be promulgated again unless a later law specifically authorizes such action.
- B. The power of the Joint Committee to suspend a rule has been upheld by the Wisconsin Supreme Court in the face of a separation-of-powers challenge. [See Martinez v. DILHR, 165 Wis. 2d 687, 478 N.W. 2d 582 (1992).]
- C. If the Joint Committee determines that a statement of policy or an interpretation of a statute is in fact a rule, it may direct the agency to promulgate the statement or interpretation as an emergency rule within 30 days of the Joint Committee's action. [See s. 227.26 (2) (b), Stats.]
- D. At the request of an agency, the Joint Committee may extend the period of application of an emergency rule beyond the 150-day maximum period provided in s. 227.24 (1) (c), Stats., for a period not to exceed 120 days. This action must be taken during the effective period of the emergency rule. [See s. 227.24 (2), Stats.] The request must be based on:
  - 1. Evidence that there is a threat to the public peace, health, safety or welfare that can be avoided only by extension of the emergency rule.
  - 2. Evidence that it is impossible for the agency to adopt a permanent rule prior to the expiration date of the existing emergency rule.